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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 798

UNITED STATES OF AMERICA, PETITIONER

v.

MONTGOMERY COUNTY BOARD OF EDUCATION, ET AL.

No. 997

ARLAM CARR, JR., ET AL.

v.

MONTGOMERY COUNTY BOARD OF EDUCATION, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the district court (R. 404–418, 430–436) [1] is reported at 289 F. Supp. 647. The majority

[1] The references are to the pages of original record on file in this Court, because the accelerated schedule under which petitioners have printed their briefs and the record did not permit substituting citations to the printed Appendix. However, for the convenience of the Court and the parties, the Appendix indicates (between dashes) the pages of the original record—all of which has been printed.

opinion of the original panel of the court of appeals is reported at 400 F. 2d 1, and the dissenting opinion at 402 F. 2d 782. The order denying the petitions for rehearing *en banc* and the dissenting opinion of Chief Judge Brown from the denial of rehearing *en banc* (joined by four other active circuit judges) are reported at 402 F. 2d 784.

JURISDICTION

The order of the court of appeals denying the petitions for rehearing *en banc* was entered on November 1, 1968. The petition for a writ of certiorari in No. 798 was filed on December 4, 1968, and in No. 997 on January 30, 1969, and both petitions were granted on March 3, 1969. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the district court correctly required the school board, which had been ordered to desegregate its faculty and which had failed to implement a constitutionally sound faculty desegregation program, to reassign its faculty members so that the ratio of Negro to white teachers in each school would be substantially the same as the ratio of Negro to white teachers throughout the system.

STATEMENT

1. *Procedural history.* This school desegregation suit was brought in the Middle District of Alabama by Negro parents and school children in 1964. The district court *sua sponte* named the United States

amicus curiae with the rights of a party.[2] On July 31, 1964, respondents were enjoined from operating racially segregated schools "except in strict accordance with the opinions and decrees" of the district court, were required to accept and to process applications for transfer of Negro students in the first, tenth, eleventh and twelfth grades, and were ordered to file a "detailed plan for the operation of Montgomery County school system commencing with the 1965–66 school year; such plan to be designed to eliminate segregation of students based on race and the complete elimination of the biracial school system within a reasonable time" (R. 103–110).

Pursuant to this order, the Montgomery County Board of Education instituted a plan allowing the transfer of certain Negro students to previously all-white schools (R. 112–148). This plan continued in operation until March 22, 1966, when the district court entered an order requiring respondents to put into effect a freedom-of-choice plan, close certain inadequate Negro schools and begin desegregation of faculties in the fall of 1966 (R. 274–284). After the decision of the Court of Appeals for the Fifth Circuit in *Davis* v. *Board of School Commissioners of Mobile County*, 364 F. 2d 896 (C.A. 5), which allowed the Mobile County school system an additional year to implement faculty desegregation, the district court

[2] There has never been any challenge by respondents to the authority of the district court to take this step. In any event, the United States is now authorized to intervene in the suit under Section 902 of the Civil Rights Act of 1964, 42 U.S.C. 2000h–2.

sua sponte amended its order in this case to give respondents the same period of time (R. 285). An order conforming substantially to the model decree of *United States* v. *Jefferson County Board of Education*, 372 F. 2d 836 (C.A. 5), affirmed on rehearing *en banc*, 380 F. 2d 385, certiorari denied, 389 U.S. 840, was entered on June 1, 1967 (R. 364).

On August 17, 1967, the United States filed a "Motion for Further Relief" alleging that respondents had failed to meet faculty desegregation requirements for the current year and asking that they be ordered to assign additional faculty members to positions where their race was in the minority (R. 376–377). After a hearing was held in the district court on this motion on September 5, 1967 (R. 450–493), and after the deposition of the school superintendent was taken, a second "Motion for Further Relief" was filed by the United States on February 7, 1968. A hearing on both motions was held on February 9, 1968.

2. *The decision of the district court.* The district court (Johnson, J.) found that, of the 550 Negro and 815 white teachers in the system, only 32 were on faculties where their race was in the minority, most of them assigned to teaching high school grades within the city of Montgomery. The court noted that "little, if any," faculty desegregation had occurred in the system's schools outside the city itself. After the entry of the 1967 order to desegregate faculties, 75 newly hired teachers had been assigned or transferred to faculties where their race was in the majority. Of the 26 white and 6 Negro teachers hired during the

first half of the 1967–68 school year, only six white teachers had been assigned to schools predominantly of another race. No desegregation of the substitute teachers, student teachers or night school faculties had occurred and none had been planned.

Finding that "the defendants have failed to discharge the affirmative duty the law places upon them to eliminate the operation of a dual school system," the district court concluded that it was "necessary and entirely appropriate to establish now more specific requirements" (Pet. No. 798, p. 20). In an order entered on February 24, 1968, the district court directed the school board, as an "ultimate objective" in disestablishing faculty segregation, to "be guided by the ratio of Negro to white faculty members in the school system as a whole" and ordered the board to achieve a racial ratio of teachers throughout the system (Pet. No. 798, p. 4). The district court required specific partial compliance for 1968–69, but denied the government's request that the ultimate ratio be implemented immediately in three schools being opened for the first time.

3. *The decisions of the court of appeals.* The school board appealed, and the plaintiffs and the United States cross-appealed from the denial of the request for the immediate complete desegregation of faculties at newly opened schools. A panel of the court of appeals (Judge Thornberry dissenting) modified that part of the district court's order which set forth the ultimate objective. It held that the standard of "good faith and effective effort" was sufficient on the ground

that a proportional requirement would not permit consideration of "the availability of teaching personnel, sound school administrative procedure, and other important factors," and because the entry of any more specific order would be "to tinker with the model decree" of the *Jefferson* case (Pet. No. 798, pp. 60–63).

Petitions for rehearing and for rehearing *en banc* were denied by the panel and by a 6-to-6 vote of the active circuit judges.

ARGUMENT

INTRODUCTION AND SUMMARY

Prior to the 1964–65 school year the respondent school board was operating a school system with "precisely the pattern of segregation to which *Brown I* and *Brown II* were particularly addressed * * *. Racial identification of the system's schools was complete, extending not just to the composition of student bodies at the two schools but to every facet of school operations—faculty, staff, transportation, extracurricular activities and facilities." *Green v. County School Board of New Kent,* 391 U.S. 430, 435. The school board's constitutional obligation, as articulated by this Court most recently in its unanimous *Green* opinion, included an "affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch." 391 U.S. at 437–438. This case concerns a standard by which courts are to measure whether the required elimination of racial dis-

crimination with respect to faculty assignments has been accomplished.

Our starting point is that in a truly unitary system the racial composition of a school's student body is not determinable from the racial composition of its faculty. Only if racial discrimination is the standard for faculty assignment will all-Negro, traditionally Negro and predominantly Negro schools have faculties which are preponderantly Negro, while schools with small or no Negro student enrollments have correspondingly low ratios of Negro faculty members or none at all. The Court of Appeals for the Fifth Circuit recognized this principle when it fixed, as the "objective" of faculty desegregation, the standard "that the pattern of teacher assignment to any particular school not be identifiable as tailored for a heavy concentration of either Negro or white pupils in the school." *United States* v. *Jefferson County Board of Education*, 380 F. 2d 385, 394 (C.A. 5, *en banc*), certiorari denied, 389 U.S. 840.

Our submission is that the standard of "racial nonidentifiability" in the conversion from a dual to a unitary system is met by refining the general terms of the *Jefferson* decree as the district court did in this case. After determining the ratio of white to Negro teachers in the system as a whole ("approximately 3 to 2"), Judge Johnson ordered that the respondents "be guided" as to faculty desegregation by that ratio, and, more specifically, that teachers be hired and assigned so that "in each school the ratio of white to Negro faculty members is substantially the same as it

is throughout the system" (Pet. No. 798, p. 25). Such a distribution of faculty members would obviously eliminate "identifiability" based on race since the racial composition of all faculties would be substantially the same.

In addition, we argue that the method ordered by the district court was proper because it brings the faculty structure of the school system approximately to where it would have stood but for the impermissible standards of assignment applied by the respondents. The principle governing the district court's duty in structuring relief for the pattern of discrimination shown by this record is that its decree must "so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future." *Louisiana* v. *United States*, 380 U.S. 145, 154. The "discriminatory effects of the past" can effectively be wiped out as to racial faculty assignments by a random distribution of the school system's teachers. Presumably, the most likely white-to-Negro faculty ratio at any single school under a random distribution would be "substantially the same as it is throughout the system." Hence the district court was correct in selecting this standard for inclusion in its equitable remedy.

I

THE DISTRICT COURT'S STANDARD IS AN APPROPRIATE MEANS OF ERASING THE RACIAL IDENTIFIABILITY OF SCHOOLS WHICH HAVE BEEN TOTALLY SEGREGATED

There is no disagreement on this record that prior to the institution of suit in 1964, respondents operated

a totally segregated dual system of public elementary and secondary education. Negro students were assigned, solely on account of their race, to separate "Negro schools," staffed entirely by Negro principals and teachers. White students attended "white schools," where enrollment and faculty were all white.

In *Rogers* v. *Paul*, 382 U.S. 198, and impliedly in *Bradley* v. *School Board of City of Richmond*, 382 U.S. 103, this Court held that equality of educational opportunity is unconstitutionally denied not only by the racial segregation of public school students but also by racial allocation of teachers. In both cases, district courts were directed to take prompt remedial measures with respect to faculty segregation. Pursuant to this principle, the Court of Appeals for the Fifth Circuit included, in the model circuit-wide decree issued in *United States* v. *Jefferson County Board of Education*, 380 F.2d 385 (*en banc*), certiorari denied, 389 U.S. 840, a section dealing specifically with the desegregation of faculty and staff. The *Jefferson* decree ordered school boards to "establish as an objective that the pattern of teacher assignment to any particular school not be identifiable as tailored for a heavy concentration of either Negro or white pupils in the school." 380 F.2d at 394.

Respondents apparently accept the generally phrased standard laid down in the *Jefferson* decree—*i.e.*, that schools not be racially identifiable by their faculties.[3] Indeed, they could not do otherwise, for this

[3] Respondents' Brief in Opposition in this Court, after quoting the language of the *Jefferson* decree, states: "A truly desegregated nonracially identified faculty is, of course, the real ultimate objective" (Br. in Opp. 12).

Court recently approved the requirement that "racial identifiability" of schools be erased. In *Green* v. *County School Board of New Kent County*, 391 U.S. 430, 442, the school board was directed to "fashion steps which promise realistically to convert promptly to a system without a 'white' school and a 'Negro' school, but just schools."

An obvious characteristic of a "white school" or a "Negro school" in a dual system is the racial composition of its faculty. Schools which have all-Negro faculties as a result of racial assignment remain "Negro schools" even if some white students are assigned to attend them. The objective of a "nonracially identified faculty" (Br. in Opp. 12) is achieved when, so far as racial distribution is concerned, the faculties of the various schools in the system are substantially indistinguishable from one another. Indeed, in his testimony the associate superintendent of the respondents' school system agreed with the court that an approximate ratio of three white to two Negro teachers in each of the schools in the system would be the optimum in removing the racial identifiability of the schools (R. 598–599).

That was the objective fixed by the district court. In directing that respondents assign teachers so that "in each school the ratio of white to Negro faculty members is substantially the same as it is throughout the system" (Pet. No. 798, p. 25), Judge Johnson was specifying how "nonidentifiability" could be achieved in a manner subject to judicial evaluation.

Nor did the district court stand alone in adopting

this yardstick by which to measure the success of a faculty desegregation program. The Courts of Appeals for the Tenth and Fourth Circuits have approved school desegregation orders which require, as a remedy to eliminate faculty segregation, "the same approximate percentage of non-white teachers in each school as there now is in the system." *Dowell* v. *School Board of Oklahoma City,* 244 F. Supp. 971, 978 (W.D. Okla.), affirmed, 375 F. 2d 158, 167 (C.A. 10), certiorari denied, 387 U.S. 931; *Coppedge* v. *Franklin County Board of Education,* 273 F. Supp. 289, 300 (E.D. N.C.), affirmed, 394 F. 2d 410 (C.A. 4). See also *Kier* v. *County School Board of Augusta,* 249 F. Supp. 239, 247 (W.D. Va.); *United States* v. *School District 151 of Cook County,* 286 F. Supp. 786, 798 (N.D. Ill.), affirmed, 404 F. 2d 1125.[4] And the Court

[4] There is no substance to the distinctions which respondents assert between this case and the cited appellate and district-court decisions (Br. in Opp. 16–17). The fact that the percentage of Negro students and faculty is lower in Oklahoma City and Augusta County than it is in Montgomery County does not affect the identifiability of faculties by race in any of the systems. Also, the alleged "administrative burdens" are, as we demonstrate at pp. 16–19, *infra*, insubstantial. Nor does the existence of intimidation in Franklin County—which assuredly affects the operation of freedom-of-choice plans of student assignment—bear directly on faculty desegregation. And finally, we do not read the "tolerance" approved in *Dowell* as permitting the extent of faculty desegregation to vary as much as respondents suggest. The permitted "tolerance," in our view, relates to the number of Negro teachers in each school, which may vary by 10% of the number to be assigned under a 14% allocation. In other words, if by strict application of the 14% formula, 10 Negro teachers are to be assigned to a given school, the court's order is satisfied if 9 or 11 Negro teachers actually are on the faculty. This variance is consistent with the provision for "approximate ratios on this case."

of Appeals for the Eighth Circuit has approved use of such a formula on the ground that it "comports with *Brown*." *Kelley* v. *Altheimer, Arkansas Public School Dist. No. 22*, 378 F. 2d 483, 498 n. 24 (C.A. 8). Compare *Yarbrough* v. *Hulbert-West Memphis School District No. 4*, 380 F. 2d 962, 969 (C.A. 8).

The standard approved by these courts and by the district court in this case is an appropriate and workable means of measuring faculty desegregation under judicial supervision. The more general terms of the *Jefferson* decree articulate the underlying purpose of such an order, but they provide no meaningful guidelines under which a school board can measure its own performance. In this very case, for example, the school board's associate superintendent testified that he could not know when faculty desegregation would be finally accomplished because the *Jefferson* order was "in fairly general terms" and "the objectives of the court order * * * [had] never been laid down in any 'percentage fashion' * * *" (R. 586). He also testified that he did not know when schools will "not be recognizable as for a particular race" because that "would depend on what the Board's definition of that is," and while the subject had often been discussed, neither his superiors nor "other school personnel [officials] * * * in America" had refined the court's "broad definition" (R. 586–587).[5]

In concluding this portion of our argument we

[5] The associate superintendent's full testimony on this subject is quoted in footnote 5 of the majority opinion of the panel below (Pet. No. 798, pp. 57–58).

believe it important to emphasize three points with respect to the mathematical standard fixed by the district court:

First, it is designed as a *remedy for* past racial assignment which, as a result of respondents' deliberate actions, has produced racially identifiable faculties. There is no suggestion in the district court's opinion, nor is there intended to be any in our submission here, that proportional allocation of faculty on the basis of race is a constitutional requirement. We do not, in other words, argue here that racially balanced faculties are constitutionally or legally required. We do, however, contend that where there has been deliberate racial segregation in teacher assignment—whether it be in the context of a full dual system as was prevalent in many Southern States or in a northern school system which, apart from faculty assignment policies, appears to be operated on a unitary nonracial basis—a proper remedy is the reassignment of teachers to eliminate racially disproportionate faculties.

Second, contrary to respondents' contention (Br. in Opp. 12–14), the formula adopted by the district court would not inhibit future hiring by the school board to overcome racial imbalance in the total faculty of the system.[6] The school board's obligation under Judge Johnson's order is to hire and assign

[6] Nor, of course, would it require that teachers of either race be hired. The formula is geared to the racial distribution of incumbent teachers. It is not intended to reflect student population of the school system to require any minimum representation of Negroes or whites in the system.

teachers "so that in each school the ratio of white to Negro faculty members is substantially the same as it is throughout the system" (Pet. No. 798, p. 25). The order goes on to recite that "[a]t present, the ratio is approximately 3 to 2" (*ibid.*), but it does not prohibit changes in that overall ratio. So long as new hiring, assignment and dismissal is conducted within constitutional limits and the mandate of the *Jefferson* decree (which prohibits consideration of race in employment of faculty and staff except for the purpose of counteracting or correcting the effects of past segregation), the school board is free to engage in hiring which may affect the overall ratio. Its only duty is to aim for and achieve (by 1970, see pp. 17–18, *infra*) a ratio at each school which is approximately the same as obtains throughout the system.

Third, since proportional distribution is only a remedy for past conduct which has produced racially identifiable schools, it need not be adhered to once the objective of erasing racial identification has been achieved. It is not, in other words, a standard fixed for perpetuity. After a school board has disestablished its dual system by reorganizing its student assignment program, restructuring faculty allocation and remedying the other vestiges of its former racially segregated operation, the subsequent racial make-up of its faculties is of no more significance than it is with a school district which has never operated a dual system. So long as there is no evidence of deliberate racially discriminatory assignment or employment, racial imbalance or disproportion in faculties would not be governed by the order entered in this case.

II

THE DISTRICT COURT'S STANDARD IS AN APPROPRIATE MEANS OF BRINGING FACULTY ASSIGNMENTS APPROXIMATELY TO WHERE THEY WOULD HAVE BEEN BUT FOR THE RESPONDENTS' UNCONSTITUTIONAL CONDUCT

We have argued above that the district court's order was proper because it provided a judicially enforceable mechanism for erasing the "racial identifiability" which marks the dual school system. Apart, however, from its effect on the "identifiability" of schools to which only or predominantly Negro or white teachers have been consciously assigned, the proportional formula prescribed by the district court is appropriate under the established principle that an equity decree should provide a "disposition * * * most consonant with justice to all interests in retracing the erroneous course that has been taken." *Addison* v. *Holly Hill Co.*, 322 U.S. 607, 619. See also Story, *Equity Jurisprudence* (14 ed.) § 28; Pomeroy, *Equity Jurisprudence* (5th ed.) §§ 60, 67.

1. The gravamen of the respondents' unconstitutional acts was their deliberate assignment of teachers by race on a segregated basis. Had they assigned faculty on nonracial criteria, it is likely that in Montgomery County Negro and white teachers would have been randomly distributed throughout the system.[7]

[7] It is, of course, possible that other criteria, although neutral on their face, would have resulted in a greater share of Negro or white teachers in certain schools. If, for example, proximity of a teacher's residence to his school were a factor, certain schools might have a greater share of white or Negro

Consequently, it is now the district court's duty, in drawing up a desegregation decree, to achieve approximately the random distribution of white and Negro teachers which would have resulted from constitutional policies of teacher assignment.

The formula adopted by Judge Johnson has this effect. To be sure, if the school board today randomly distributed all its teachers among its 52 schools, they would not all have 60 percent white teachers and 40 percent Negro teachers. But, by the laws of probability, a greater number would have substantially that racial proportion and, as to any individual school, that ratio would be the most likely.

The district court's order follows the principles governing equity decrees applied in *United States* v. *Crescent Amusement Co.*, 323 U.S. 173 (which this Court cited in its discussion of remedies in the recent *Green opinion,* 391 U.S. at 438 n. 4). For the language of the *Jefferson decree,* like the language challenged in the *Crescent Amusement* case, "bids fair to call for a retrial * * * any time a citation for contempt is issued." 323 U.S. at 186. As we pointed out at p. 12, *supra,* the school board's officials did not know how they were to comply with it. Here, as in *Crescent Amusement,* the "situation * * * permits of a more selec' treatment" (*ibid.*), and here, as in *Crescent Amusement,* relief must take into account

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teachers. There is no evidence in this record that this was true in Montgomery County and, in any event, we read the district court's order as permitting minor departures for such reasons under the qualifying adverb "substantially."

the fact that "[t]he pattern of past conduct is not easily forsaken" (*ibid.*).[8] For these reasons, the district court properly eschewed a general formulation in favor of a decree with very specific objectives.

Nor does the similarity between this case and *Crescent Amusement* end with the equivalent need for specific relief. Here, as in *Crescent Amusement*, the claim is made that the relief decreed by the court below is excessively harsh and that it casts heavy burdens on the defendant. The answer to that argument was provided in the *Crescent Amusement* opinion, where the Court held that "[t]hose who violate * * * may not reap the benefits of their violations and avoid an undoing of their unlawful project on the plea of hardship or inconvenience." 323 U.S. at 189.

In fact, the plea of hardship has been made in other similar cases and rejected by the Court of Appeals for the Fifth Circuit. In *United States* v. *Board of Education of City of Bessemer*, 396 F. 2d 44 (C.A. 5), it was asserted that involuntary transfer of teachers to desegregated positions could not be accomplished and that no terminal date should be fixed for total faculty desegregation. As Judge Brown, the author of the *Bessemer* opinion, pointed out in his opinion dissenting from the denial of rehearing *en banc*

[8] Between the entry of the *Jefferson* decree in June 1967 and the February 1968 hearing, more than 75 new teachers were assigned to schools where their race predominated. Of 31 new teachers hired after the September 1967 hearing, only six were assigned to minority-race positions (R. 502–503, Gov. Exs. 2–32).

here, the court in *Bessemer* "did do four things" (Pet. No. 798, p. 76):

> The first was to rule out the voluntary approach. The second was to fix an immediate target date, for the School Board to report specifically what it had done and would do for the school year 1968–69. The third was to fix the date—implicit in *Jefferson*—for full compliance, as the beginning of the school year 1970–71. Fourth, we declared that since Negroes were not to be required to wait until "C-day"—1970–71, to see the evidence of compliance, we sounded in the plainest of words that *specifics* were now the order of the day. Specifics in June-August for the school year 1968–69. More so, specifics for the succeeding year 1969–70, leading to the climax of September 1970.

The circuit-wide requirement of full compliance by September 1970 was announced with due consideration for the claim of administrative hardship. Indeed, on account of difficulties which might arise in immediate implementation of total faculty desegregation requirements, the Fifth Circuit gave school boards an opportunity to achieve the ultimate objective in three stages, permitting partial progress for the fall of 1968 and 1969, and requiring total compliance only as of 1970.[9] The claim of administrative hardship now made by the school board (Br. in Opp. 17) rings particularly hollow in a case containing a finding such as the one made by the district court here (Pet. No. 798, p.

[9] It is not immaterial to note, in this regard, that the *Jefferson* decree was issued in the spring of 1967, and school districts such as respondent's were subject to its faculty provisions before the 1967–68 school year.

17): "The evidence does not reflect any real administrative problems involved in immediately desegregating the substitute teachers, the student teachers, the night school faculties, and in the evolvement of a really legally adequate program for the substantial desegregation of the faculties of all schools in the system commencing with the school year of 1968–69." Respondents do not cite evidence to challenge this finding; nor did the court below determine that it was erroneous. The few factors enumerated by respondents which relate to where a teacher should be placed (Br. in Opp. 10) do not justify a conclusion of any hardship whatever—much less one which would justify the delay or denial of a constitutional right. If a teacher in a particular school has skills which peculiarly fit the needs or talents of that school, there is, of course, no requirement that he be transferred. The district court's decree requires only that his race be taken into account in determining who else is to be assigned to that school.

2. The original panel of the court of appeals eliminated "the numerical ratios set forth in the district court's order and decree" (Pet. No. 798, p. 63) on the grounds that (1) a school board was carrying out its constitutional obligation if it made "a good faith and effective beginning and a good faith and effective effort to achieve faculty and staff desegregation for the entire system" (Pet. No. 798, p. 62), and (2) "[c]onsideration must be given to the availability of teaching personnel, sound school administrative procedure, and other important factors" (Pet. No. 798, pp. 62–63), and

that therefore "standards fixed by the courts with respect to faculty desegregation cannot be totally inflexible" (Pet. No. 798, p. 60).

The court below thereby misapprehended both the purpose of the court order and its effect. If the history of school desegregation litigation establishes anything, it is surely that reliance on vague standards is inadequate to bring about a realization of the constitutional rights at issue. Good faith is, of course, important. (See this Court's opinion in *Green,* 391 U.S. at 439). But the critical question must be not the state of mind of the school board, but whether the desegregation plan it is implementing "promises realistically to work, and promises realistically to work *now.*" *Ibid.*

The record here demonstrates that general instructions provide no realistic road towards faculty desegregation. Until the district court fixed specific numerical guidelines, the school board had placed only 32 teachers of a total faculty of 1365 in desegregated positions. As Judge Brown noted in his dissenting opinion below, "[s]pecifics are needed" (Pet. No. 798, p. 74), and only specifics will insure that the dual structure of faculty assignments will be eliminated.

The panel of the court below also erred in assuming that the order of the district court was "inflexible" and that it was impossible to take account of factors such as the availability of teachers and school administrative procedures in meeting the ratios fixed by the decree. All that the decree required was that the faculties be reassigned so that the ratios be

"substantially" the same. Minor departures from the overall ratio for sound and legitimate administrative reasons are, of course, permissible and they are contemplated by the court order.

Indeed, sound administration depends in large measure on planning, and one of the principal vices of the decision below is that it creates great uncertainty with respect to what school boards are to do and makes planning difficult. The very same uncertainty which marked the testimony of the board's associate superintendent now affects school districts throughout the states in the Fifth Circuit and produces dissimilar results of the kind referred to by Judge Brown in his dissenting opinion below.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed and the numerical ratios in the district court's decree should be reinstated.

Respectfully submitted.

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